United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4165

In The

United States Court of Appeals

For The Second Circuit

MAURICE GERSHMAN d/b/a QUEENS-NASSAU NURSING HOME,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CYCLE CLEANING CORP.,

Respondent.

On Appeal from the National Labor Relations Board

BRIEF FOR PETITIONER, MAURICE GERSHMAN D/B/A QUEENS-NASSAU NURSING HOME

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(8841) LUTZ APPELLATE PRINTERS, INC.
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South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 75-4165 and 75-4188

- X

MAURICE GERSHMAN d/b/a QUEENS-NASSAU NURSING HOME, :

Petitioner, :

- against - :

NATIONAL LABOR RELATIONS BOARD, :

Respondent. :

- X

NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

- against - :

CYCLE CLEANING CORP., :

Respondent. :

- X

On Appeal from the
National Labor Relations Board

BRIEF FOR PETITIONER
MAURICE GERSHMAN d/b/a
QUEENS-NASSAU NURSING HOME

I. STATEMENT

On July 31, 1975, pursuant to Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.), (the "Act") Maurice Gershman d/b/a Queens-Nassau Nursing Home (hereinafter sometimes referred to as "Home" or "Nursing Home"), instituted this appeal by filing with this Court a petition to review and set aside an order issued against it by the National Labor Relations Board (hereinafter sometimes referred to as the "Board") on June 30, 1975, in a consolidated case appearing on the Board's records as Case Nos. 29-CA-3924 and 29-RC-2659. The Board's Order affirmed without opinion the rulings, findings, and conclusions of an Administrative Law Judge and adopted his recommended Order (after correcting certain errors which are irrelevant to this proceeding).

The Board, pursuant to Section 10(f) of the Act and Section 15(b) of the Federal Rules of Appellate

Procedure, has filed a cross-application for enforcement of its said Order. In addition, the Board moved this Court to consolidate the Nursing Home's appeal with its application for enforcement of the Board's Order against Cycle Cleaning Corp. (hereinafter sometimes referred to as "Cycle"), an independent contractor who took no appeal from the Board's Order. This Court granted the motion to consolidate by Order dated September 15, 1975.

II. ISSUES ON THIS APPEAL

A. Did the Board err in holding that vicarious liability should be imposed upon contractor, where the Employer exercised incidental supervision over the employees of the independent contractor?

B. Does it effectuate the purposes of the Act to attribute liability under the Board's "Joint Employer" doctrine to an Employer where an independent contractor committed an unfair labor practice that did not come within the ambit of Section 8(a)(5) of the Act?

C. Should the Board's "Joint Employer" doctrine be invoked against an Employer in the health care field who employs an independent contractor, where the health, safety, and welfare of the patients under the care of the Employer necessitates that such Employer exercise a modicum of supervision over the work performed, but not the means by which it is performed, by the employees of the independent contractor?

D. Should the contractual rights of an Employer to control the terms and conditions of employment of employees of an independent contractor, or the incidental de facto exercise of such control, determine the scope and extent to which the Board's "Joint Employer" doctrine should be invoked?

STATEMENT OF FACTS

The Nursing Home, at all times herein material, was engaged in the operation of a nursing home and the performance of related services at 520 Beach 19th Street, Queens, New York. Cycle, which maintained its principal office and place of business at 7730 164th Street, Queens,

New York, was, at all times herein mater..., engaged in providing housekeeping and porter services and related services for various nursing homes located in the City and State of New York, including the Nursing Home (See Decision, Findings of Fact, "I. Respondents' Businesses," at page 3).

No common ownership existed between the Nursing Home and Cycle (TR. 467/10). (Unless otherwise indicated, parenthetical references are to the page and line of the transcript of the hearings.)

None of the officers, directors or stockholders of Cycle have any interest or hold any office in the Nursing Home (467/14).

The accounting system employed by the Nursing Home is not in any way utilized jointly or in conjunction with that of Cycle (467/19, 419/18).

There are no profit sharing, insurance, or other compensation plans of the Nursing Home which would reward or compensate employees of Cycle (418/18, 467/23).

Cycle and the Nursing Home maintain their own independent offices, geographically removed from one another (468/2, 425/20).

At the end of each week, one of Cycle's supervisors picks up the time cards for Cycle's employees and takes them back to Cycle's offices so that the payroll can be computed (136/9, 469/7). Cycle's time cards were green, and the cards of others were different colors (602/25). There are separate cards for Nursing Home employees and Cycle employees (603/20).

Cycle and the Nursing Home each prepared their own job descriptions (469/20, 470/14). Cycle posts its job descriptions in the porters' closets in the facility (421/1), and gave copies to each employee (141/8, 212/5). Wikinson, a Cycle employee, had his job description described to him by Cycle supervisors (141/7).

The performance of contract cleaning work for the Nursing Home by Cycle necessarily meant that the Nursing Home's supervisors had to work closely with those of Cycle. Watkins, a Cycle supervisor, testified:

"Q. Mrs. Watkins, the contract between Queens Nassau Nursing Home and Cycle Cleaning required Cycle Cleaning Company to perform certain housekeeping functions within Queens Nassau Nursing Home.

Is that correct?

A. Total cleaning.

Q. And the performance of that function, did that require that you work closely with the administrative personnel of the nursing home?

A. Yes, all department heads, you have to.

Q. Would it in fact be necessary in the performance of those duties that the administrative, or supervisory personnel, exercise some degree of supervision or control over Cycle employees?

A. Yes." (416/5).

In order to attain a close working relationship between the supervisors of Cycle and the Nursing Home, Cycle afforded the administrator or assistant administrator of the Home with an opportunity to interview candidates for supervisory positions with Cycle. Watkins further testified:

"The fact that management and housekeeping,

what-have-you, did have to work together, we found that it worked out much better if we had an interview with, say, the administrator or assistant administrator or what have you.

"We tried to work together in that line.

"We found it was more successful than just bringing in a stranger in and having personality clashes, if nothing else.

"Q. Was it in fact Cycle that hired the housekeeper?

"A. Yes.

"Q. Was the housekeeper in fact on Cycle's payroll?

"A. Yes." (418/15).

When the contract with Cycle was first signed, Watkins was at the home every day, for a period of three weeks or a month. After a regular housekeeper was hired, she came by approximately once a week (396/8).

Cycle drew up the schedule for its porters and maids (137/8, 212/22, 418/25). Cycle determined which days of the week each of the various employees were to work (213/8, 419/3), which employees were to work on holidays (214/2, 419/6), who was to work overtime (137/19, 213/11), and which shift the various employees

were to work (419/9). These decisions are made without consultation with the Home (419/12).

Cycle also did not consult in any way with the supervisory staff of the Nursing Home when hiring porters and maids (417/15).

Cycle provided housekeeping services to seven or eight nursing homes in the City of New York (420/1).

The formulation of job descriptions, personnel policies and labor policies for Cycle's employees is done solely by Cycle without consultation with the Nursing Home (421/20). Porters and maids were disciplined only by Cycle supervisors (422/13, 423/6).

Even when a porter is called off his regularly

assigned job by a supervisor at the Home, that supervisor will generally seek the permission of a Cycle supervisor (143/1, 216/9, 617/7).

The Nursing Home asked employees of Cycle to attend in-service training meetings relating to Infectious Diseases (436/1). It was important that the employees of both knew what the other were doing (440/8). The porter and janitorial services have a direct impact on the spread of infectious disease (440/21). Other than that, Cycle provided its own in-service training programs to Cycle employees servicing nursing homes (439/23).

For a period of time, Mr. Lebowitz, a supervisory employee of the Nursing Home, acted as head housekeeper, but this was only a temporary situation until Cycle could employ their own housekeeper (439/4). The porters employed by Cycle wore name tags that said "Queens Nassau Nursing Home", but they also have the name "Cycle" embroidered in red letters on their uniform and their uniforms are blue, rather than white (466/11, 619/12). This was true of all of the porters and maids furnished

by Cycle (466/24).

The Administrative Law Judge, in commenting on the interchangeability of employees between Cycle and the Home, stated (Decision at p. 5, line 35):

> "As for the duties of the employees of Cycle and Home being interchangeable Watkins testified that 'In case of emergency...no one...is held to job descriptions,' and went on to explain, 'Now, by "emergency", I don't mean that the roof is falling down but perhaps someone has not shown up for a job or...they have an empty slot and they have to get something done.'"

The proper import of that quotation can best be discerned by viewing it in its actual context and comparing it with the record as a whole. Watkins' full statement was (424/19):

> "Q. Now, when you send a porter or a maid into the Queens Nassau Nursing Home, is it custom and practice for the Queens Nassau Nursing Home to take any one of these employees out of their scheduled job and assign them to a nurse's aid's job or to assign them to a kitchen job or anything of that sort?

"A. Well, this very rarely happens. In case of emergency, there's no one who is held to job descriptions.

"Q. Would you catagorize the kind of circumstances into which someone is taken out of classification as being an emergency-type situation?

"A. Well - -

"Q. Now, by 'emergency', I don't mean that the roof is falling down but perhaps someone has not shown up for a job or that, you know, they have an empty slot and they have to get something done

"That type of an emergency.

"A. Yes. I understand what you mean.

"For instance, one afternoon both elevators broke down.

"There is a third floor for patients there.

"The porters were asked not only to help carry the trays up the steps but to stay over, which all of them said yes, you know, without hardly any question and did".

It will be noted that Watkins did not go "on to explain" the words attributed to her. The description of an "emergency" situation referred to by the Administrative Law Judge was contained in the question. Watkins'

actual response to an "emergency type" situation was to describe an occasion when both elevators broke down.

When Wilkinson, a Cycle employee, was asked to go to the laundry, which was not part of his regular job, he was paid by the nursing home from petty cash (139/18). When he was asked to install some valves in the dishwasher, also not part of his regular job, permission had to be asked of the Cycle supervisor (142/21). He was on occasion told what to do by Nursing Home supervisors, but he was never told how to do the work (120/6).

McKethen was also hired by Cycle as a porter (181/16). When he was asked to help out the maintenance man to bring in air-conditioners, not part of his regular job, permission was first asked of the Cycle supervisor (215/20). McKethen freely acknowledged that he was responsible to Cycle supervisors (217/25).

Mr. Workman, a Cycle supervisor, was transferred to the Nursing Home from another job run by Cycle (424/11).

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The Administrative Law Judge stated (Decision p. 6, line 9):

> "Ortiz also testified credibly that when he was head porter, before he could call in a replacement for an absent porter or before he could take time off himself he had to get permission either from Assistant Administrator Lebowitz (employed by the Nursing Home) or from Watkins (employed by Cycle)." (Parenthetical statements provided.)

This statement is not in accord with the testimony. Ortiz, in fact, testified as follows (617/24):

> "Q. Do you remember making a statement to the effect, 'if I went to Lebowitz and asked him for time off, he said he would call Cycle Cleaning and then advised me if I could have the time off'.
> "Do you recall making that statement?
>
> "A. Yes.
>
> "Q. Was that true when you made it?
>
> "A. Yes.
>
> "Q. Was it---is it true today?
>
> "A. If he called Cycle, he probably did it.
>
> "Q. Did you make that statement?

"A. Yes.

"Q. And when you asked Mr. Lebowitz for time off, he would tell you he would call Cycle and check it out?

"A. I guess so, yes."

Obviously, Lebowitz, an employee of the Nursing Home, did not grant Ortiz time off unless he first checked it out with Cycle. Ortiz also confirms that Watkins, a Cycle supervisor, had to give her permission before porters could be assigned the task of passing out food when the elevators were stuck (617/7).

Mr. Krakowski, the Nursing Home's administrator, in a statement prepared for his signature by the Board's representative, did state that, "if overtime was needed on a non-emergency basis, the housekeeping department would have to have it authorized by the house". (460/15). The fact that the statement was made was not denied. The fact that it was accurate, however, was not established. To the contrary, at the hearing Krakowski testified (457/15):

"Q. If overtime is required to perform porter

and maid duties in the home, on a normal basis, Mr. Krakowsky, would Queens Nassau Nursing Home have to authorize this overtime?

"A. No.

"Q. It would not?

"A. No."

The type of control that the Home exercised over Cycle employees is best exemplified by the following statement by Krakowski (454/2):

"I am not allowing a patient to break a hip because I'm not allowed to bring one porter from one floor to the other floor".

The contract between the parties, although inartistically drawn, is prefaced by a letter dated August 24, 1973, which clearly delineates the intent and objectives of the parties (G.C. Exhibit 15). It states:

"Cleaning costs are increasing. Supplies, equipment and labor will continue upward, while top quality housekeeping supervisors are dwindling. We, as contractors, can transform these functions into an efficient operating department, utilizing modern methods and devices.

"A few of the benefits to be derived from the services which we render are: No

concern with the hiring, training, and supervision of housekeeping personnel; purchasing of supplies and equipment; or repairs that are needed. Another factor is the elimination of bookkeeping and payroll problems attributed to your housekeeping department. You will have a FIXED ANNUAL HOUSEKEEPING BUDGET.

"Additional levels of outside management and technical personnel will regularly visit the Nursing Home to insure ever-improving standards."

Further, the contract places full supervisory responsibility with Cycle, although assuring the Nursing Home that it need not fear the imposition of unanticipated or undesirable changes (G.C. Exhibit 15 at p. 18):

"We will hire all personnel and supervision for the Housekeeping Department. We shall, during the course of operation, effect such changes as we deem advisable in order to establish an efficient department. In addition to the Supervisor on the staff of the Nursing Home, we will provide inspections by Supervisors from our general staff. All changes will be made only after discussion and mutual agreement with the Nursing Home Administration."

Under the caption "General Information", the contract states (G.C. Exhibit 15 at p. 20):

"The specifications herein listed are more for outline of duties rather than

> an attempt to be all inclusive. It is clearly the intent of the company to perform all such duties as would be performed by the Housekeeping Department. The Housekeeping Department will operate as a part of the Nursing Home staff.
>
> "Our employees are covered by Workmen's Compensation, Public Liability and Property Damage Insurance.
>
> "This contract will adhere to all existing Department of Hospitals and other health agency regulations. The undersigned (Cycle) will pay all City, State and Federal taxes, and account for all persons engaged to perform the work and services of this contract under this agreement." (Parenthetical matter supplied.)

It is recognized that a "Statement of Facts", whether prepared by the Administrative Law Judge or one of the parties hereto, tends to support the legal conclusions propounded by the writer. In one case it may be attributable to the legitimate function of an advocate. In another, it may be ascribed to the frailties of human nature. In a footnote to his Decision and Order (p. 6), the Administrative Law Judge comments:

> "4) Regularly porters have been ordered by Administrator Lebowitz and by Supervisor Watkins to do jobs such as unloading trucks,

going to the laundry, storing supplies, painting, putting in light bulbs, plumbing, assisting in the kitchen, moving beds with aides, carrying luggage for patients, fixing appliances, moving sprinklers and assisting maintenance employees with their many duties, none of all of the foregoing being part of their regular duties as porters."

The footnote blithely ignores the facts:

a. Lebowitz acted as housekeeper for a short time, until Cycle obtained their own housekeeper (439/4). Watkins was Cycle's supervisor.

b. When a Cycle employee was asked to go to the laundry, he was paid by the Nursing Home (139/18).

c. A Cycle supervisor was first consulted when one of its employees was asked to work on plumbing (120/6).

d. A Cycle supervisor was first consulted when one of its employees was asked to fix appliances (215/20).

e. Cycle supervisors were first consulted when one of its employees were asked to assist maintenance employees (120/6, 215/20).

f. Cycle porters were asked to assist in the kitchen, not "regularly", but once a year on a Jewish holiday (144/8).

g. The foregoing were isolated instances, and not "regular" requests.

Undoubtedly, the Administrative Law Judge would feel justified in levelling charges of a similar nature against this writer. We submit, however, that the art of advocacy's emphasis on selected detail is not responsive in a meaningful way to the overriding policy consideration that the purposes of the Act be effectuated.

In the case at bar, an independent contractor was held to have violated Sections 8(a)(2) and 8(a)(3) of the "Act". It was not charged that the Nursing Home directly participated in the commission of these violations. Further, it was not established that the Nursing Home in any way condoned, aided, or abetted Cycle in the commission of these violations. Yet, both the Nursing Home and Cycle were held jointly and severally liable, on the basis of a "Joint Employer" relationship, to reinstate Cycle's employees and for the payment of back-pay, social security, and other payroll taxes. In accordance with the contract between the parties and textbook concepts of the liabilities of independent

contractors, these would normally all be liabilities of Cycle. In our ensuing "argument" we shall try to determine if, under such circumstances the purposes of the Act are best effectuated by imposing vicarious liability upon, or imputing liability to, the Nursing Home.

ARGUMENT

A. THE BOARD ERRED IN HOLDING THAT VICARIOUS LIABILITY SHOULD BE IMPOSED UPON AN EMPLOYER FOR THE ISOLATED ACTS OF AN INDEPENDENT CONTRACTOR, WHERE THE EMPLOYER EXERCISED INCIDENTAL SUPERVISION OVER THE EMPLOYEES OF THE INDEPENDENT CONTRACTOR.

The Home entered into a contract with Cycle, an independent contractor, for the provision of housekeeping services. Cycle performed similar work for other health care facilities, and its corporate structure and internal operations, including its office, bookkeeping and payroll, were completely independent of those of the Home. Cycle promulgated and distributed its own job descriptions, had a distinctive color for its uniforms and employee time cards, embroidered its own name on its employees' uniforms and developed and enforced its own labor policies. Virtually every condition of employment for Cycle employees, including scheduling of the workweek, holidays

and overtime, and setting wages, were established by Cycle without consultation with the Home.

By every known standard or criteria for imposing vicarious liability, the Home should not be held responsible for the acts of Cycle's employees. Cycle was not an alter ego of the Home. Cycle stood to make a profit from its contract with the Home and was ready, willing and able to serve any who might contract for its services. It was not employed by the Home to fraudulently deprive workers of their collective bargaining rights or any rights arising out of the bargaining process. The Home, in fact, consented to the election out of which this proceeding arose. Cycle did not have the authority, express, apparent, or implied to act as the Home's agent, and its agreement with the Home was not a subterfuge to enable the Home to exercise control over Cycle's employees. None of these facts are disputed. Further, the Administrative Law Judge did not find that the evidence in any way supported a finding that the Home participated in, had

advance knowledge of, acquiesced in, or ratified the acts of Cycle's supervisors which formed the basis of the unfair labor practices of which both Home and Cycle were jointly liable.

We are left, therefore, to consider whether the practice of allowing the Home to interview new supervisors before they are hired by Cycle is of significance when viewed with the fact that upon occasion the Home asked Cycle employees to unload trucks, paint, put in light bulbs, and carry luggage for patients (even though the record does not conclusively establish that these are not tasks of Cycle's housekeepers).

It is respectfully submitted that the opportunity afforded to the Home to interview prospective supervisors of Cycle, is nothing more than an accommodation to a contract vendee where supervisors of both parties are required to work closely together. It is a practice, we submit, which should not be discouraged. The other incidental requests hardly amount to that degree of supervision or

control necessary to destroy the independent contractor relationship, and the requests related only to the results to be accomplished and not the detail or manner in which the work was to be done. (120/6; Williams v. United States, 126 F.2d 129).

In the case of National Labor Relations Board v. Mayer (196 F. 2d. 286) where both §§ 8(a)(1) and 8(a)(5) charges were filed, the principle of vicarious liability for the 8(a)(1) charges was enunciated: (p. 290)

> "This Court has held that in order to charge an employer with the acts of another for the purpose here under consideration, such person must be one who in fact and law is the employer's agent. Such person must act under the employer's control and direction or under his orders, or if the acts were originally unauthorized, they must be ratified expressly or impliedly, before they can be attributed to the employer. The mere fact that an employer receives and enjoys the benefits of the unsolicited or unauthorized acts of another does not of itself amount to ratification. N.L.R.B. v. Russell Mfg. Co. (5 Civ.) 187 F. 2d. 358; N.L.R.B. v. Tex-O-Kan Mills Co., 5 Cir. 122 F. 2d. 433, headnote 10. Other Courts are in accord. See N.L.R.B. v. Myland-Sparta Co., 6 Cir., 166 F. 2d 485; N.L.R.B. v. American Pearl Bottom Co., 8 Cir. 149 F. 2d. 311. Compare N.L.R.B. v. Loister-Kouffmann Corp., 8 Cir.,

144 F. 2d. 9."

Based upon the foregoing, the circuit court held that the acts of another in discriminating against a particular union could not be attributed to the employer who neither participated, had knowledge of, or ratified the wrongful practices committed by such other person, and there was no agency relationship between the employer and such other person upon which to impose vicarious liability under the doctrine of respondent superior.

In Lummus Company v. N.L.R.B., 339 F. 2d. 728, an employer association was held not to be liable for the unfair labor practices of a labor union with respect to certain exclusive hiring hall agreements and refusals to hire certain applicants. The holding was based upon the Court's finding that for an "employer" to be responsible for the unfair labor practices of another, it must have had actual notice of, or be reasonably charged with notice of the practice. The Court significantly pointed out that it would be error to mechanically apply the doctrine of

respondent superior in finding vicarious liability where no responsibility for the practices charged can be attributed to a particular employer. Thus, the Court stated (p. 737):

> "I think that this case presents a situation which calls for other than a mechanical application of the doctrine of respondent superior. Without laboring the point I hesitate to attribute to an employer statutory culpability, which is predicated on a finding of discrimination, in a situation where the employer's action is dictated by a lawful hiring agreement and the employer is not apprised of and, so far as the record shows, is unaware of unlawful action taken by the other party to the agreement."

Thus, in the cases where joint liability has been imposed, it is not because the party vicariously held liable was technically a "joint employer" and thus was per se liable, but because the latter either participated in the wrong, had knowledge of the wrong, acquiesced in it, or where the latter's control and supervision of the person committing the wrong is so complete that liability in fairness and equity may be imputed to him. See N.L.R.B. v. Grower's-Shippers Ass'n., 122 F. 2d. 368, 378.

In cases where an "employer" hires an independent contractor to do a specified job, and the latter is charged with unfair labor practices under Sections 8(a)(1)(2) or (3) of the Act, the courts have consistently held the "employer" liable for the acts charged upon the basis that the employer was independently culpable for the unfair labor practice violations.

Thus, in N.L.R.B. v. Glueck Brewing Co., 144 F. 2d. 847, the court held that just as an independent contractor could be held liable for the unfair labor practices of another, the principal employer (a brewing company) would be held liable if it used the independent contractor as an instrumentality in the forbidden interference with labor matters, as charged under the act.

In Butler Bros. v. Natl. Labor Relations Board, 134 F. 2d. 981, the court held that a building owner was liable for the unfair labor practices of the independent contractor maintenance company servicing its building where the court found that the agreement between the owner and

independent contractor was but a subterfuge for the owner to avoid certain demands made upon it by the union. There the employees of the owner became employees of the maintenance company under the agreement, and the owner continued to exercise such control over the labor relations policies and other essential terms of the employment (e.g. hiring and discharge) as to be chargeable with the discriminatory acts involved.

Applying the principles enunciated in these cases, it is respectfully submitted that the Board committed serious errors of law in applying mechanically the doctrine of respondent superior to arrive at the conclusion that because the Nursing Home admittedly exercised certain incidental control and supervision over Cycle's employees (as was necessary in furtherance of operational efficiency and patient's safety and welfare), that it be held liable for §§ 8(a)(2) and (3) charges attributed solely to the acts of Cycle's supervisors, where the Nursing Home in no manner whatsoever was responsible for those acts (See Lummus Company v. N.L.R.B., supra., at p. 737).

By reason of the foregoing, we believe and contend that the Nursing Home should not be held vicariously liable for the isolated acts of the independent contractor. To so conclude would necessitate that we adopt a totally mechanistic approach to the question of joint liability, without regard to the purposes of the Act we are attempting to effectuate. It is our position that the Administrative Law Judge and the Board both erred in this case in reaching a conclusion as to the existence of a "Joint-Employer" relationship before determining the nature of the unfair labor practices and the Home's culpability therefor. As a result, we are faced with the bizarre task of convincing this Court that the Nursing Home should not be jointly and severally liable; (1) for reinstating an employee who is not on its payroll to a position it does not have available because it subcontracts out such work; (2) for paying backpay and related taxes for which it is not normally liable and for which it has contracted not to pay; and (3) for the acts of an

individual over whom it can not and does not exercise any control, and which acts it has not actively or passively supported, participated in, condoned or ratified.

We do not mean to suggest that there are never any circumstances where it could be perceived that the acts complained of were committed to thwart the purposes of the Act through artifice, scheme, or devise. For instance, corporations that utilize interlocking directorships, have common stockholders or a similarity of officers and directors, would be suspect. But what of the unrelated bystander? When do we hold an Employer liable for acts he may never have heard of until charges are served upon him in a labor board proceeding? The better practice, by large, would be to first determine which violations of the Act have been established and then determine whether the purposes of the Act would be effectuated by imposing joint and several liability.

B. IT DOES NOT EFFECTUATE THE PURPOSES OF THE ACT TO ATTRIBUTE LIABILITY UNDER THE BOARD'S "JOINT EMPLOYER" DOCTRINE TO AN EMPLOYER WHERE AN INDEPENDENT CONTRACTOR COMMITTED AN UNFAIR LABOR PRACTICE THAT DID NOT COME WITHIN THE AMBIT OF SECTION 8(a)(5) OF THE ACT.

The Act states that the declared "policy of the United States" is to encourage "the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (29 U.S.C. at §151). The cases reiterating and affirming this policy statement are legion. The ingredient essential to the implementation of this policy is the willingness of the Employer to recognize and bargain collectively with the authorized representative of the employees. Section 8(a)(5) of the Act provides that it shall be an unfair labor practice for an employer

"to refuse to bargain collectively with the representatives of his employees***." Since a violation of Section 8(a)(5) would tend to thwart the basic policy of the Act, determinations as to the existence of a joint employer relationship may be found to be present in such cases where the facts may be insufficient to justify such a finding under other circumstances.

Sections 8(a)(2) and 8(a)(3) of the Act relate to practices which tend to dominate or interfere with union organization or lend support to one union over another, and practices which discriminate against employees to encourage or discourage membership in any labor organization. These latter Sections are remedial in nature, endeavoring to eliminate any impediments or obstacles reasonably required to bring the parties to the collective bargaining table. In cases involving violations of these latter two Sections, actual control, or culpability of an employer, should be a prerequisite to a finding of a joint employer relationship. NLRB v. Deaton, Inc., 502 F. 2d. 1221 (5th Cir., 1974); NLRB v. Sachs, 503 F. 2d. 1229 (7th Cir., 1974).

The U.S. Supreme Court, in Labor Board v. Atkins & Co., 331 U.S. 398, holding that an employer must bargain with a militarized guard as its employee, stated the principle that where collective bargaining is appropriate with a particular employer, the necessary employer-employee relationship will be found to exist so as to get the appropriate parties to the bargaining table. The court stated (at p. 413):

> "In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than common law concepts in mind. That relationship may spring as readily from the power to determine wages and hours of another coupled with the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." (Emphasis supplied)

In N.L.R.B. v. Hearst Publications, 322 U.S. 123, the Supreme Court stated as follows (at p. 124):

> "Whether, given the intended national uniformity the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning ---' Rather, 'it takes color from its surroundings --- [in] the statute where it appears,' United States v. American Trucking Asso. 310 U.S. 534, 545, 84L Ed. 1345, 1352, 60 S. Ct. 1059, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' " (Emphasis supplied.)

We must, therefore, turn to the statutory purpose in order to correctly apply the facts of each case. For example, where the charge is within the ambit of § 8(a)(5), and the statutory purpose is to encourage collective bargaining with the appropriate parties, a different standard should be utilized than where the charges are within the ambit of §§ 8(a)(2) or (3), and the statutory purpose is to hold culpable parties responsible for their own acts which impede implementation of statutory policy.

The "statutory purpose doctrine" for distinguishing

cases upon their own particular facts in relation to the Act was set forth in Carnation Co. v. N.L.R.B., 429 F. 2d. 1130, wherein the court stated (at p. 1134):

> "This circuit has applied the "purpose of the statute" test in situations calling for common-law principles. See e.g. McGuire v. United States, 349 F. 2d. 644 (9th Cir. 1965); West creu v. Stockholders Publishing Company, 237 F. 2d. 948 (9th Cir. 1956) the view that an employee for one purpose is an employee for all purposes has been expressed in dissent: See United States v. Silk, 331 U.S. 704 719, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947) --- We reject this view as mechanistic."

Assuming arguendo, that the Nursing Home may be considered a "joint employer" for some purposes, e.g. as a party to the collective bargaining process for the purpose of a § 8(a)(5) violation, it would not effectuate the purposes of the act, where the Home is not the responsible party, to consider it a "joint employer" in order to hold it liable for §§ 8(a)(2) and (3) violations.

The distinction which we are making is readily apparent when we compare two prior Board cases, i.e., Greyhound Corp. (153 N.L.R.B. 118, 59 L.R.R.M. 1665) and

Charlotte Union Bus Sta., Inc. (135 N.L.R.B. 228, 49 L.R.R.M. 1461). In the Greyhound case, where a § 8(a)(5) charge was lodged, the bus station company was found to be a "joint employer" with the independent contractor maintenance company for collective bargaining purposes because its control over the latter's hours and wages, and the integration of the two employment units made a single bargaining unit appropriate. In Charlotte however, under similar operative facts, for purposes of § 8(a)(1) and (3) charges, the bus station company was not liable for those charges even though it maintained substantial control over the maintenance employees' work activities. While the Board did not express the "purpose of the statute" test in either of these cases, it arrived -- perhaps fortuitously -- at the appropriate result in each case.

Finally in this regard, even if we were to assume the liability of the Nursing Home, as a Joint Employer, under the Act, we are still faced with the question as to whether the penalty invoked did not exceed the Board's power and authority to render.

Discussing the appropriateness of remedies and the court's review powers, the court in Williams Motor v. N.L.R.B., 128 F. 2d. 960, stated (at p. 965):

> "The discretionary power of the Board is to select any remedy which reasonably is adapted to effectuate the policies of the Act and fitted to the particular situation being dealth with by it. *** In determining whether a particular remedy is justified in a particular situation, there may be many consideration. Among these, two are pertinent here, which are somewhat counterbalancing. One is the 'restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination' *** The other is the 'dislocation of the business' of the employer. ***"

It is respectfully submitted that the Board's remedy in holding the Home jointly and severally liable with the Independent Contractor for damages in back pay, where it is not the culpable party and was never responsible for the maintenance employee's wages in the first instance, is not supported by the evidence and clearly is outside the Board's powers. Further, how can the Nursing Home be expected to reinstate the aggrieved employee to a position that is non-existent as far as the Nursing Home's payroll is concerned? This type of dislocation, it is

submitted, is not contemplated by the Act.

In summary, it is respectfully urged that the purpose of the Act, and more specifically §§ 8(a)(2) and (3) (as are charged herein), would not be served by holding the Nursing Home liable for those charges where it is not the culpable party, and that the imposition of damages in the form of reinstatement and back pay are remedies not fitted to the case at bar and outside the Board's powers to impose.

C. THE BOARD'S "JOINT EMPLOYER" DOCTRINE SHOULD NOT BE INVOKED AGAINST AN EMPLOYER IN THE HEALTH CARE FIELD WHO EMPLOYS AN INDEPENDENT CONTRACTOR, WHERE THE HEALTH, SAFETY, AND WELFARE OF THE PATIENTS UNDER THE CARE OF THE EMPLOYER NECESSITATES THAT SUCH EMPLOYER EXERCISE A MODICUM OF SUPERVISION OVER THE WORK PERFORMED, BUT NOT THE MEANS BY WHICH IT IS PERFORMED, BY EMPLOYEES OF THE INDEPENDENT CONTRACTOR.

As was discussed in points "A" and "B", infra, it is respectfully urged that the Board was in error in finding the home liable for the discriminatory and coercive acts of Cycle's supervisor, where it neither participated in, nor ratified, those wrongful acts, and where its incidental supervision had no relationship to or bearing upon the unfair labor practices charged.

It is further submitted, that whatever incidental supervision was exercised, was mandated by the unique circumstances of health care facilities, where operational efficiency in furtherance of patient health, safety, and welfare is of the utmost importance. A Nursing Home must operate safely and efficiently to be in compliance with

the statutes, codes, and regulations governing its operation, and implicit in operational efficiency is the requirement of close coordination and supervision between the nursing home and maintenance staffs. The coordination required to meet health and safety standards, however, should not serve to expose the health facility to all forms of liability, including that of an unfair labor practice with which, as in the present case, it was not involved.

To impose liability and damages upon the Nursing Home, where it was attempting to carry out its responsibilities for meeting high health care standards, would be to impose punishment upon an innocent party who is attempting to comply with the law. The Legislature recognized the unique nature of the health field, and the special dangers involved, when it passed legislation (Title 29 U.S.C. § 158(9), as amended 1974) severely limiting labor strikes in the health care field. Furthermore, the Occupational Safety and Health Act (29 U.S.C. § 651 et seq., effective April 28, 1971), imposes upon every employee subject to the Act the duty to furnish a safe place of employment.

The Board has recognized that where "safety" is a factor upon a particular job site, the exercise of control and supervision in the attempted furtherance of that goal does not render a prime contractor a "joint employer" over the employees of another. In Local 825, Int'l. Union of Operating Engineers (Morin Elec. Co. Inc.) (168 NLRB 1), the Board held that the prime contractor at a construction site is not a "joint employer" over the subcontractor's employee, a crane operator, merely because it exercises control and supervision which in substance amounts to safety instructions. The violations involved were § 8(b)(4)(i) and (ii)(B) of the Act, relating to secondary boycotts, and the Board held that the routine instructions and safety requirements exercised by the prime contractor do not amount to the type of control that would classify them as joint employers. Also in Charlotte Union Bus Station, Inc. (49 LRRM 1461), (135 NLRB 228), the Board found against "joint employer" status of the facility operator, over the maintenance crew (in relation to § 8(a)(1) and (3) unfair labor practice charges), even where control and supervision over the latter was substantial, but where this control

and supervision was necessitated by the operational requirements of the particular facility involved, to wit, a bus station. All the more so, where coordinated effort and some safety supervision over the housekeeping staff is mandated in the health facility, such supervision should not lead to the conclusion, and the Board was in error in so concluding, that the Nursing Home occupied the status of a "joint employer" so as to be charged with the unfair labor practices committed by another.

D. THE CONTRACTUAL RIGHTS OF AN EMPLOYER TO CONTROL THE TERMS AND CONDITIONS OF EMPLOYMENT OF EMPLOYEES OF AN INDEPENDENT CONTRACTOR, AND NOT THE INCIDENTAL DE FACTO EXERCISE OF SUCH CONTROL, SHOULD DETERMINE THE SCOPE AND EXTENT TO WHICH THE BOARD'S "JOINT EMPLOYER" DOCTRINE SHOULD BE INVOKED.

A critical element in determining whether the Nursing Home occupies "joint employer" status with Cycle, is whether it has retained the contractual right to determine or control the essential terms and conditions of employment of Cycle's maintenance employees. In Williams v. United States, 126 F. 2d 129, 132, the Court held that an employer-employee relationship (for purposes of determining who is responsible for employee payroll taxes) "exists only where the person for whom the work is done, has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished (Singer Mfg. Co. vs Rahn, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440; Jones v Goodman 10 Civ. 121 2d 176, 179)" (Emphasis added). The court also determined that "it is the right and not the

exercise of control which is the determining element" 126 F. 2d at p. 132 (Emphasis added). In other words, it is the right to control and determine the incidents of terms of employment as expressed in the contract which is determinative of whether an employer-employee (viz a viz, independent contractor) relationship exists and not the de facto control which at times may be exercised to achieve certain purposes, as was discussed in point B, infra. (See Butler Bros. v. N.L.R.B., 134 F. 2d 981, 984.) Manifestly, this "right of control" must extend to the manner of its performance and not merely to the result sought by the person for whom the work is done. (In re Morton, 284 N.Y. 167, 30 N.E.2d 369, mot. den. 284 N.Y. 738, 31 N.E. 2d 205.) In the Morton case, supra, the court looked to the express terms of the contract and found that the prime contractor retained a substantial degree of control over the maintenance employees of the purported independent contractor, to wit, the right to hire and discharge, set work schedules and formulate labor relations policy. Accordingly, the court held that the prime contractor was the "employer" of the maintenance

employees for purposes of the Act. In Williams, supra, however, the court came to a contrary conclusion, holding that the owner of the premises was not the employer of members of a music band engaged on the premises (e.g. the hotel establishment). In this latter case, the owner did not retain the incidents of control pursuant to the express terms of the contract. The court specifically cited the "right to hire and discharge" the persons doing the work as the most decisive element of the right to control, while other (lesser) elements of control consisted of (1) the right to determine the method of payment, (2) which party furnishes the tools and materials, and (3) whether the purported independent contractor stands to make a profit on the work done and whether said contractor is a going concern ready, willing and able to serve any who might contract for its services.

The contract between the parties (G.C. Exhibit 15) clearly indicates by its terms that the Home had no right of supervision or control over Cycle's housekeeping workers, such as the right to hire or discharge, to set work schedules, job descriptions, or wages and overtime compensation. Thus,

under the Williams rationale, the Home did not retain any of the indicia of control over the essential terms of employment of the workers involved, pursuant to its agreement with Cycle, by which the Board could construe that an employer-employee relationship existed between the Home and the housekeeping workers. Furthermore, as already pointed out, the occasional exercise of control not expressed in the contract, amounting to mere requests or occasioned by special circumstances, should not alter this result. As the court in Williams stated (supra, at p. 132).

> "We have referred heretofore to findings No. 19 which designates numerous acts performed by the establishments relied upon to show control. As pointed out however, those acts were found to have been committed by the establishments 'at times'. Control, so indefinite in its extent, must give way to the uncontroverted findings which lead to an opposite result. Moreover, such control as was exercised was without right. The status of the parties was plainly fixed by the contracts, including the rules of the Federation, and there is no room for argument that the establishments had any right of control." (Emphasis supplied.)

The court goes on to state that whatever control was exercised by the "establishment" was more aptly described

as requests that something be done by the independent contractor's employees. The court found that this exercise did not destroy the relationship to the independent contractor or make the owner of the premises the "employer" of the independent contractor's employees, where the contract itself did not delegate to the establishment any indicia of control.

Upon those occasions when the Nursing Home requested that certain things be done by the housekeeping employees, it never dictated to those employees the manner in which the thing should be done, nor does the contract give it the right to do so. The letter of intent from Cycle, which was incorporated into the agreement, clearly indicates that Cycle assumed sole responsibility for its employees as regards the manner of performing the housekeeping work, as well as over the terms of employment (e.g. payroll, work, schedules). Thus, it stated in pertinent part:

> "A few of the benefits to be derived from the services which we render are: No concern with the hiring, training, and supervision of housekeep ng, personnel, purchasing of

> supplies and equipment, or repairs that are needed. Another factor is the elimination of bookkeeping and payroll problems attributed to your housekeeping department. You will have a FIXED ANNUAL HOUSEKEEPING BUDGET." (G.C. Exhibit 15.)

In addition, the contract states that "Cycle" shall train its housekeeping personnel (G.C. Exhibit 15, at p. 18a), hire its own supervising personnel, and effect its own operational changes with a view toward establishing "efficiency". (G.C. Exhibit 15 at p. 18.)

Therefore, it is respectfully urged that in addition to the other contentions advanced herein, the court should find that the Board was in error as a matter of fact and law in holding that a "joint employer" relationship existed, where the Nursing Home had no contractual right to exercise control or to determine the essential terms of employment of the housekeeping employees of Cycle.

CONCLUSION

By reason of the foregoing, it is respectfully requested that the Board's Order dated June 30, 1975, be

modified on the law and the facts to the extent that said Order and the rulings, findings, and conclusions upon which it is based, hold that a joint-employer relationship existed between Cycle and the Nursing Home, and that the cross-application for enforcement by Respondent National Labor Relations Board be in all respects denied, together with such other, further, and different relief as to this Court may seem proper.

Yours, etc.

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A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAURICE GERSHMAN etc.,

Petitioner,

- against -

NATIONAL LABOR RELATIONS BOARD.,

Respondent

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 17th *day of* October *19* 75 *deponent served the annexed* Brief

upon Elliott Moore Esq. & Laura Ross *attorney(s) for* Blumenfeld Esq.

in this action, at Office of the General Counsel, NLRB
1717 Pennsylvania Ave, N.W., Wash. D.C.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 17th
day of October *19* 75

Print name beneath signature

EUGENE L. ST. LOUIS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977